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LETTERS OF CREDIT

THE ordinary circular letter of credit, familiar to tourists, has never played much part in the operations of trade and finance. My aim is not to deal immediately with this form of letter but rather to discuss the legal difficulties growing out of the various forms of so-called "commercial letters of credit" used in financing over-seas trade. This method of trade financing has not been much used by us in our domestic operations, and has come into common use in our foreign trade only since the war. On this account, in spite of the enormous volume of business in which these letters now figure, they show a great lack of uniformity in form and content, and some lack of certainty in their practical construction and their legal scope and meaning.

Commercial letters of credit, while in use for a long time in our business world, have attained no standardization either of kind, form [1] or legal construction. They may be mere informal advices, or more or less formal authorizations from a purchaser to draw on certain bankers here or abroad, or directions to given bankers to accept vendor drafts on certain conditions, or sometimes they are merely requests to negotiate the sale of such drafts. Ordinarily

[1] J. P. Beal, "Utility of Letters of Credit in Export Trade — a Plea for Standard Forms," 95 BANKERS' MAGAZINE (N. Y. 1917), 271. "It is interesting to note the many different forms used by various banks; they all seem to be different in some respects. Some banks merely write an explanatory letter on their regular letter heads, while others have forms set up on which to record the various points in relation to terms of the credit."

where a bank confirms to the addressee the issuance of a letter, commercial usage regards this as a "confirmed letter of credit," entitling those to whom it is confirmed, upon compliance with its conditions, to look to the confirming bank for payment, without recourse. The lay mind, not without judicial authority, seems to regard this as a sort of contract of guaranty.[2] Great importance is attached to the use of the words "confirmed" and "irrevocable" in such letters even though what is said to be "confirmed" and "irrevocable," and is so regarded in practice, may not in some cases be so at all in legal fact.[3]

The conditions and provisions of these letters vary with the exigencies of each case, and no very definite or uniform rules of construction, either in practice or in our courts, seem yet to have been attained. This is due to the fact that before the present war our general foreign business was for the most part financed in other ways. When we suddenly became the world's great selling market, confronted with new and strange buyers, and new business and exchange difficulties, our exporters found it expedient in many cases to demand either cash with the order or confirmed New York credits; with the result that this letter of credit device, which for many years has worked well on occasion here and which was in familiar use abroad, came quickly into extensive use. Whether it will be much used after the war remains to be seen. The provincial desire of the average American exporter to sell for cash or its equivalent with his order, the possible decline of the London discount market, changes in international trade and banking, commercial instability abroad, new and experimental markets and the like, may well tend to a more extensive use of these letters of credit and procure for them an established place in the law merchant. But in any event, their increased use during the last

[2] "Commercial letters of credit are issued at thirty, sixty, ninety days', four or six months' sight, sometimes at other usage. A bank which issues such a letter of credit virtually agrees with the party in whose favor it is issued, although not always in so many words, that his drafts, drawn under and in conformity with and within the amount of the credit, shall be duly honored on presentation, provided that he complies with the text of the credit. This is usually regarded as practically equivalent to a guaranty of payment to the holder." B. OLNEY HOUGH, PRACTICAL EXPORTING, 546.

[3] See authorities cited *post*. Business houses seem to regard a letter "confirmed" *eo nomine* as irrevocable before expiration date named therein, while a letter not so "confirmed" is revocable at will. See Beal, *supra*.

four years is bound presently to bring to our courts a variety of perplexing problems.

A study of the English and American decisions bearing on the subject discloses much uncertainty and ambiguity of construction and interpretation. The familiar circular letter of credit is an offer addressed to given addressees, or to the world in general, agreeing to be bound by their acceptance of the offer within its terms and provisions. So we shall find this theory of offer and acceptance made the *ratio decidendi* in cases where other elements clearly should be considered. Other decisions give these letters the attributes and characteristics of negotiable instruments, and so reach conclusions not justified by the law or the facts. Others treat them as contracts of guaranty or of money held to the use of another, or money had and received. Others treat them as contracts between two parties for the use and benefit of a third. Others grant relief on the basis of estoppel or by upholding the customary commercial practice and interpretation of the parties as part of the substantive law merchant. Obviously it is important, both commercially and juristically, to determine if possible a sound legal theory applicable to these cases.

This is so, not only in order to avoid confusion where confusion is unnecessary, but to enable the commercial world to deal with more confidence and safety with this instrument of trade and finance which it has devised. A variety of practical questions of far reaching import to the commerical world impend upon the legal theory applied to the construction and interpretation of these letters. For instance, if we are to proceed on the theory of offer, the question of revocability must be determined differently than if we proceed on the theory of money had to use. If such letters are to be construed, for example, as guaranties, their practical feasibility under our law is much hampered. So that on the legal theory applied by the courts, whatever it may be, will depend not only the standard form these letters should take, but also the ultimate disposition of such practical questions, constantly arising and sure to be litigated as, assignability; revocation; construction of the terms of the contract as to sale and delivery; the relation of the letter to the contract of sale and the extent to which such contract of sale, expressly or by implication, should be or is part of the letter; failure of complete performance of the contract of sale

giving rise to the letter, and controversies as to breach of such contract; rights of issuer and other parties in case of a notice to stop payment; rights in case of failure to perform the sale contract because of *force majeure*, government embargoes, commandeered ships, etc.; insolvency of parties; attempts at rescission by holder or issuer; effect of changes made or of dealings had between purchaser and vendor after issuance of letters; procurement of the credit by fraud or unauthorized use of the letter. And on the legal theory applied may also depend the solution of the question, now apparently somewhat ignored, as to how a bank's outstanding letters of credit are to be treated in its accounting or under the national banking law.

I

In trying to arrive at any sound theory of law applicable to these letters, one naturally turns first to their place of origin. The letter of credit is an old institution of continental commercial law, well understood as far back as the seventeenth century. When, through trade with Europe, the institution became known to us, our courts turned naturally, in our period of absorption of the law merchant, to the continental books for guidance in construing it and copious citations from these books appear in our earliest letter of credit cases.[4] The subject had a simple theoretical development on the continent which gave effect to the mercantile idea that a promise made in course of business is enforceable. In Anglo-American law, on the other hand, in the generation following Lord Mansfield, it became definitely settled that a merchant's promise in writing made in a business transaction did not suffice of itself to create legal obligation, hence the continental theory could not be adopted. Other reasons, partly economic, prevented letters of credit from assuming much importance in our commerce and as a result there does not seem to have been sufficient litigation over them to compel the working out of a consistent legal theory. When the outbreak of the war required new credit devices in our foreign trade, it was natural that the commercial letter of credit, somewhat dormant with us, but in common use abroad, should be employed to fill the gap without much consideration being given to its legal character and implications.

[4] Coolidge *v.* Payson, 2 Wheat. (U. S.) 66 (1817); Russell *v.* Wiggin, 2 Story (U. S.) 213 (1842); note to Mandeville *v.* Riddle, 1 Cranch (U. S.) 290, 298, 366 (1803).

The letter of credit discussed in the continental treatises on commercial law [5] is of the sort most familiar to us as the conventional traveler's letter, addressed to a particular correspondent, a group of correspondents or to the world at large (in the latter case called a circular letter of credit),[6] requesting the addressee or addressees to pay money or give credit to the holder up to a certain amount [7] within a time limited and agreeing to become responsible therefor to the addressee or to accept the addressee's bill therefor.

The importance to us of continental law as to letters of credit is twofold. In the first place, as has been said, we got this idea from the continental books and practice, and it has had its fullest theoretical development in their commercial law; and in the second place it has always been legitimate in any discussion of our law merchant, which in its formative period drew so largely on continental sources, to refer to the civil law by way of analogy. Moreover in the present connection it happens that the commercial law of continental Europe is able to furnish us two fruitful suggestions: one, the idea of treating a commercial promise as being enforceable as such; the other, the practice of treating such a letter as an *ouverture de crédit* and as conclusive evidence of money had and received and held for the use of the addressee.

According to the French books, the letter of credit has two aspects, depending on whether it is looked at as between the issuer of the letter and the correspondent or as between the issuer of the letter and the holder. In the former aspect — as between issuer and correspondent — the French treat the letter of credit as a species of mandate.[8] By mandate the Romanist means a transaction whereby one party known as the *mandans* gives to another, known as the *mandatary*, a commission to do something, whereby the mandatary having done the thing in question, is entitled to be

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[5] 4 LYON-CAEN ET RENAULT, TRAITÉ DE DROIT COMMERCIAL, 4 ed., §§ 736–48; 2 BÉDARRIDE, DE LA LETTRE DE CHANGE, 2 ed., §§ 633–41; 2 PARDESSUS, COURS DE DROIT COMMERCIAL, § 585; POTHIER, TRAITÉ DU CONTRAT DE CHANGE, § 236; COSACK, LEHRBUCH DES HANDELSRECHTS, 2 ed., § 188. For the history of the letter of credit see GOLDSCHMIDT, UNIVERSALGESCHICHTE DES HANDELSRECHTS, 397 *ff.*

[6] 4 LYON-CAEN ET RENAULT, § 736, note 3.

[7] This is usual. 4 LYON-CAEN ET RENAULT, § 736. But it may also be unlimited.

[8] 4 LYON-CAEN ET RENAULT, § 738; 2 BÉDARRIDE, DE LA LETTRE DE CHANGE, 2 ed., § 633.

reimbursed.[9] Accordingly, as between the issuer of the letter and the correspondent the letter of credit is a mandate. It is a mandate to the correspondent to pay to or give credit to the holder; the correspondent becoming thus entitled to be reimbursed by the issuer of the letter. But the correspondent is not obliged to pay or to give credit. He simply acquires a claim against the issuer by doing so. Hence, as between the issuer of the letter and the correspondent it is revocable down to the time the correspondent acts on it,[10] like any mandate.[11] On the other hand, as between the issuer of the letter and the holder the transaction is treated as one of "opening of a credit" (*ouverture de crédit*) and hence is not revocable.[12] It is taken to show an opening of a credit between the one who gives the letter of credit and the one for whom it is given.[13] This requires some explanation. In continental banking, the borrower from a bank arranges for a credit on which he can draw. In other words, as we should put it, he overdraws to the amount agreed upon.[14] There is not a loan, as in our practice, but an agreement to loan up to a certain amount within a certain time. As the civilians put it, there is not a *mutuum* but a *pactum de mutuo dando*.[15] This doctrine is a result of the modern idea of the binding force of a promise made as a business transaction [16] and of the equally modern notion of the power of the promisee to exact specific performance.[17] Accordingly the promise to make a loan, which in Roman law was unenforceable, as a mere pact, unless made in the form of a stipulation, in the modern law is a binding transaction.[18] Glück says of the *pactum de mutuo dando:*

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[9] INST. III, 26; POTHIER, TRAITÉ DU CONTRAT DE MANDAT, § 1.

[10] 4 LYON-CAEN ET RENAULT, § 738.

[11] FRENCH CIVIL CODE, Art. 1984.

[12] 4 LYON-CAEN ET RENAULT, § 739.

[13] *Id.*, § 736.

[14] 4 LYON-CAEN ET RENAULT, § 709 *ff.* On this subject, see FALLOISE, TRAITÉ DE L'OUVERTURE DE CRÉDIT.

[15] 4 LYON-CAEN ET RENAULT, §§ 684, 709.

[16] A good account of this in English may be seen in LEE, ROMAN-DUTCH LAW, 197–99.

[17] See Amos, "Specific Performance in French Law," 17 L. QUART. REV. 372.

[18] *Ouverture de crédit* or *promesse de prêt*, 2 COLIN ET CAPITANT, DROIT CIVIL FRANÇAIS, 662; 2 BAUDRY-LACANTINERIE, PRÉCIS DE DROIT CIVIL, 10 ed., § 1576; 20 BAUDRY-LACANTINERIE, TRAITÉ DE DROIT CIVIL, § 700; *Promessa di mutuo*, 2 CHIRONI, ISTITUZIONI DI DIRITTO CIVILE ITALIANO, § 354; *Krediteröffnung, Darlehensvorvertrag, Darlehensversprechung*, 2 DERNBURG, BÜRGERLICHE RECHT, 3 ed.,

"Most civilians are agreed that the bare agreement to make a loan to another binds the promisor and gives rise to an action against him. . . . For according to the Roman law a *stipulatio de mutuo dando* has actionable obligation. But today a bare agreement is as efficacious as a Roman stipulation." [19]

In French law an *obligation à donner* involves a duty to deliver *in specie* and hence is treated much as we do cases to which we apply the equitable maxim of considering that as done that ought to be done.[20] It follows that the promise to loan money or extend credit is not only legally enforceable but the case is treated as if the promisor actually held the money of the promisee.[21]

If, then, a letter of credit is treated as an opening of a credit, it means that the case is considered as one where the person for whom the letter is given has deposited money with the one who gives the letter, to be drawn on by those who advance money upon the letter. The third person who advances money on the letter is treated the same as a depositor drawing on his account. Simply those who give credit on the faith of the letter draw on the deposit instead of the holder of the letter, and they do this by virtue of the contract of mandate between the one who issues the letter and the one to whom it is addressed. As between the issuer of the letter and the holder, the letter is not revocable because the law holds the promisor in the opening of a credit to performance of his promise. But when a mandate has ceased to be executory it has ceased to be revocable.[22] Because of their theory of mandate the French usually provide an express clause as to revocability.[23]

When this French theory of the letter of credit is applied to our law it will be seen that, although at first sight both the theory of the *pactum de mutuo dando* and the theory of the mandate are inapplicable, we have legal doctrines which may be utilized to bring about similar results. If in French law the letter of credit testifies to an opening of a credit, in our law it may be said to amount to an

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§ 236; 2 CROME, SYSTEM DES DEUTSCHEN BÜRGERLICHEN RECHTS, § 247; 4; 1 ENNECCERUS, KIPP UND WOLFF, LEHRBUCH DES BÜRGERLICHEN RECHTS, 1912 ed., § 364.

[19] 12 GLÜCK, PANDEKTEN, § 779. See also 4 GLÜCK, § 292; 13 STRYK OPERA OMN., ed. of 1840, 312.

[20] FRENCH CIVIL CODE, Art. 1136.

[21] 20 BAUDRY-LACANTINERIE, TRAITÉ DE DROIT CIVIL, § 701.

[22] INST. III, 26, § 9.

[23] 4 LYON-CAEN ET RENAULT, § 739.

acknowledgment of money received from the holder of the letter to the use of the person to whom it is addressed upon the conditions named in the letter. When acted upon by the person to whom it is addressed this would certainly estop the issuer of the letter from denying that he held the money as acknowledged. As we have no such institution as the Roman mandate, we should not be confronted with the difficulty that the transaction would be irrevocable on the one side and revocable on the other while executory. For our purposes the doctrine of money received to the use of a third person, and the estoppel involved in change of position upon the faith of the acknowledgment, would suffice.

The German law on the subject is substantially the same. It is set forth in convenient form by Cosack.[24] Cosack makes a distinction between a mandate of credit (*kreditauftrag*) and a letter of credit (*kreditbrief*). He says that the letter of credit strictly is in the nature of *anweisung* rather than mandate. The *anweisung* of the older law consisted of two parts, a mandate to pay and a mandate of satisfaction. For this clumsy legal theory of a bill of exchange in terms of Roman law the Germans have now worked out a theory of the bill of exchange as a single formal legal transaction. When, therefore, Cosack says the letter of credit and the bill of exchange are species of this same general theoretical genus, he not only gives us a more scientific analysis but brings out that the letter of credit as a device of finance is really as much a substantive transaction of the law merchant as is a bill or note; a position which it seems our courts might well adopt.

Summing up the situation in the continental commercial law, we may say the letter of credit is a mandate to some particular addressee, or addressed generally to such person as may comply with it, commissioning him to pay money, or give credit to the holder, whereby the addressee or the person (in case of a circular letter of credit) who complies with it, becomes entitled to hold the issuer of the letter for the sum of money advanced or the credit given within the terms of the mandate. So far, translated into our law, there is nothing but an offer to the correspondent or to the world at large, accepted by giving credit or advancing money according to the terms of the offer. And it is significant that in the very

[24] LEHRBUCH DES HANDELSRECHTS, 7 ed., § 79.

useful analysis at the end of Ames' "Cases on Bills and Notes" [25] he treats the letter of credit precisely on this theory. But this type of letter of credit does not meet the requirements of international business to-day. What does meet it squarely is the French theory of the letter of credit as testifying to an opening of a credit between the holder and the issuer of the letter, so that the letter is really an authorization to the addressee to draw upon the money deposited by the holder with the issuer. That fits in with the requirements of international business to-day exactly, and fits well with our common-law doctrine of money received to a third party's use.

It is worth noting also that the development of the continental law on this subject has been hindered if not warped by two conditions which are paralleled in our own experience. The civilians, familiar with the earliest and simplest or so-called tourist form of letter, could not escape its analogy when confronted with the newer forms, and proceeded on the assumed necessity of fitting every form of letter, including those developed by present-day commerce into a legal theory of third-century Rome. That is to say, the doctrine of mandate being at hand to explain one form of letter, it was assumed that all other forms must be made to fit into that doctrine. So our courts, in the development of the subject, also suffer from this same analogy of the tourist letter and the same assumed necessity of fitting a present-day transaction of commercial usage into some common-law theory of a day that is past. The noticeable disposition of the more recent continental writers,[26] in the language of Maitland,[27] to "face modern times with . . . modern weapons," to distinguish the new from the old and to regard the letter of credit we are here considering as a self-sufficient transaction of the commercial law and as part of the growing law merchant, deserves thoughtful consideration at the hands of common-law lawyers.

II

Common-law categories have never willingly conceded a place in the sun to the novelties developed by the exigencies of modern business. It required a long struggle culminating in an act of Par-

[25] 2 CASES ON BILLS AND NOTES, 783.

[26] COSACK, *supra*.

[27] 3 COLLECTED PAPERS, 485.

liament to induce the common law to recognize the written instruments of the law merchant. As enlightened a judge as Lord Holt resisted reception of the promissory note into the company of legal transactions, and even now that bills and notes are established mercantile specialties the courts do not like to admit them as such in theory but seek to fit them into the common-law category of simple contracts. Checks were able to establish themselves as forms of bills, but insurance policies soon ceased to be instruments of the law merchant and have had a common-law development; and to-day bills, notes and checks are the only recognized instruments of the law merchant. At one time it seemed as if letters of credit might be so treated, so that the promise of a merchant or banker as a transaction of the law merchant in the form of an irrevocable letter of credit could stand on its own bottom as a binding and self-sufficing legal transaction.[28] But the development of the law merchant along liberal lines and its free absorption into our common law seem to have stopped with the passing away of our earlier generation of constructive judges, and for the last half of the nineteenth century hard and fast molds were at hand into which all mercantile transactions and inventions must inevitably be fitted.[29] Hence we must perforce deal with this subject on common-law lines, and seek to give effect to the demands of commerce by means of some common-law theory.

The decisions of our courts on this subject in the past have had to do with four common-law conceptions, namely: offer, resulting in simple contract; guaranty; contract for the benefit of a third person; and estoppel.

To-day it is generally assumed that the letter of credit is an offer made into a contract by extension of a credit according to its

[28] Marshall, C. J., in Coolidge *v.* Payson, 2 Wheat. (U. S.) 66, 75 (1817); Story, J., in Russell *v.* Wiggin, 2 Story (U. S.) 213, 231 (1842); Bronson, J., in Birckhead *v.* Brown, 5 Hill (N. Y.) 634 (1843). See also as evidence of this, *dicta* in Scribner *v.* Rutherford, 65 Iowa, 551, 22 N. W. 670 (1885); Johannessen *v.* Munroe, 158 N. Y. 641, 53 N. E. 535, 9 App. Div. 409 (1899), 41 N. Y. Supp. 586; Liggett *v.* Bank, 233 Mo. 590, 136 S. W. 299 (1911); 2 DANIEL, NEGOTIABLE INSTRUMENTS, 3 ed., § 1790.

[29] For example, the clearing-house when it arose, was not recognized for the purposes of the doctrine as to presentation within a reasonable time, and but for the opportune enactment of the uniform Negotiable Instruments Law, legislation would probably have become necessary. Holmes *v.* Roe, 62 Mich. 199, 28 N. W. 864 (1886); Edmisten *v.* Herpolsheimer, 66 Neb. 94, 92 N. W. 138 (1902).

terms.[30] Accordingly, if addressed to a specific person, sometimes called a "special letter of credit," [31] it cannot be accepted by anyone else.[32] The courts often discuss this as if it were a question of assignability or negotiability,[33] or of strict construction of the liability of a surety or guarantor.[34] If the letter of credit were treated as an institution of the law merchant, requiring no common-law theory to uphold it, the result would be the same, as the instrument does not confer a power upon anyone but the addressee named. But the same courts usually end by putting the matter in terms of offer and acceptance.[35] Where the letter is addressed generally to whomsoever may act upon it (*i. e.*, a general letter of credit), the apparent procedural exigencies of special *assumpsit* and the elusive word "privity" formerly gave rise to difficulties.[36] Our courts, however, soon came to hold that this was a case of an offer addressed to the world at large, which became a contract as soon as anyone accepted or performed its terms, exactly as in the case of an offer of reward.[37] Here also the same result would be reached if the letter were treated simply as an instrument of the law merchant, since by its express terms it confers upon anyone who will act thereon the power of becoming a creditor of the issuer. It should be noted also that the instrument treated as an offer of payment to be accepted by extension of credit to the holder has sometimes been in form a statement addressed by the issuer to the holder, advising the latter of the issuer's willingness to become

[30] Cairns, L. J., *In re* Agra and Masterman's Bank, 2 Ch. App. 391, 395 (1867). "The liability of a writer of a letter of credit is founded on the simple law of contracts, where the minds of the parties must meet in the common purpose. The act of the writer is an offer, or request, or proposition, and the act of him who furnishes the money is an acceptance." Bank of Seneca *v.* First National Bank, 105 Mo. App. 722, 726, 78 S. W. 1092 (1904).

[31] Birckhead *v.* Brown, 5 Hill (N. Y.) 634 (1843); Union Bank *v.* Coster, 3 N. Y. 203 (1850).

[32] Fletcher Guano Co. *v.* Burnside, 142 Ga. 803, 83 S. E. 935 (1914); Robbins *v.* Bingham, 4 Johns. (N. Y.) 476 (1809); Birckhead *v.* Brown, 5 Hill (N. Y.) 634 (1843), aff'd, 2 Den. (N. Y.) 375; Taylor *v.* Wetmore, 10 Ohio, 491 (1841).

[33] Robbins *v.* Bingham, *supra;* Birckhead *v.* Brown, *supra.*

[34] Walsh *v.* Bailie, 10 Johns. (N. Y.) 180 (1813); Birckhead *v.* Brown, *supra;* Taylor *v.* Wetmore, *supra.*

[35] *E. g.*, Bronson, J., in Birckhead *v.* Brown, *supra.*

[36] Bank *v.* Archer, 11 M. & W. 383 (1843); see also Russell *v.* Wiggin, 2 Story (U. S.) 213 (1842); Franklin Bank *v.* Lynch, 52 Md. 270, 281 (1879).

[37] Lawrason *v.* Mason, 3 Cranch (U. S.) 492 (1806); Birckhead *v.* Brown, *supra;* Union Bank *v.* Coster, *supra.*

surety for him, if a certain credit was extended,[38] or an offer to guarantee acceptance and payment of drafts,[39] or an offer to the addressee to "see him paid," which would at least suggest an offer to become secondarily liable.[40] Obvious difficulties involved in the law of suretyship and guaranty led the courts to strain the construction a bit in order to bring such cases within the offer theory of letters of credit; though other courts have refused to treat such papers as more than offers to become surety or guarantor and have distinguished them from letters of credit.[41] Where the wider interpretation is given to the paper, it must be upon some notion that the addressee has changed his position upon the faith of an understanding of its terms which though not correct he might reasonably entertain; in other words upon the theory of estoppel.

Confusion has arisen in carrying out this offer theory, which in itself is simple and consistent enough, by importing into it a question of the law of negotiable instruments that seems superficially to be involved but in reality is quite beside the point. If one agrees to accept a bill already drawn, or one to be drawn, in such wise as clearly to point out the very instrument, a court of equity, to prevent embarrassment of the case of the holder because of his want of the written evidence to which he is specifically entitled, would decree the promised acceptance.[42] And courts of law accordingly have treated a promise thus specifically enforceable as amounting to an acceptance and have allowed the promisee to sue the promisor as an acceptor. But the terms of the promise must be clear and definite in order to be specifically enforceable; and so, if the bill or bills are to be drawn in the future, courts may properly

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[38] Lawrason *v.* Mason, *supra.*

[39] Union Bank *v.* Coster, *supra.*

[40] Cheever *v.* Schall, 87 Hun (N. Y.) 32 (1895). Here the letter in suit read: "Let Mr. G. have your farm . . . for the term of five years and I will see you paid." G showed this letter to plaintiff, who leased the farm to him on the strength of it. The court said it was "a general letter of credit." If it had been treated as a guarantee, a question would have arisen whether, under the statute of frauds, it was necessary that the name of the addressee appear on the letter. The court obviously sought to avoid this.

[41] *E. g.*, Scribner *v.* Rutherford, 65 Iowa, 551, 22 N. W. 670 (1885). The letter read: "A. P. Kenyon wants a little money; if you want anyone on the note, I will fix it when I come in." The court refused to treat this as more than it professed to be, to wit, an offer to become surety on Kenyon's note if money was loaned him.

[42] Bank of Montreal *v.* Thomas, 16 Ont. 503 (1888).

insist on a considerable particularity of description before allowing promisor to be held as acceptor.[43] When, however, the addressee sues, not on the bill seeking to hold the issuer as an acceptor, but on the contract to accept bills drawn under and within the terms of the letter, no more particularity ought to be required than in any other case of offer and acceptance. If there is enough certainty to make a contract there is a cause of action.[44] Unhappily the origin of the requirement of particularity in the description of the bills to be drawn has often been overlooked, and in actions for breach of contract to accept, the courts have demanded all the certainty involved in a decree for specific performance, and hence involved also in an action to charge the promisor as acceptor.[45] With the relaxation in equity of the strict rule as to certainty, so that it is enough if there is a contract at law which the court is in a position to enforce without making a new contract and without undue hardship,[46] the basis of the doctrine in *Coolidge* v. *Payson* is doubtful and more than one court long ago gave it up.[47] At all events it has nothing to do on principle with liability upon a letter of credit in an action for non-acceptance or non-payment of drafts drawn in accordance with the terms of the letter.[48]

Letters of credit which might well have been dealt with on the offer theory have sometimes been treated on a theory of guar-

[43] Coolidge *v.* Payson, 2 Wheat. (U. S.) 75 (1817); Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264 (1828); Boyce *v.* Edwards, 4 Pet. (U. S.) 111 (1830); Garrettson *v.* North Atchison Bank, 39 Fed. 163 (1889); Ulster County Bank *v.* McFarlan, 3 Den. (N. Y.) 553 (1846); First National Bank *v.* Clark, 61 Md. 400, 406 (1883); Lewis *v.* Kramer, 3 Md. 265, 289 (1852).

[44] Franklin Bank of Baltimore *v.* Lynch, 52 Md. 270, 280 (1879); Lafargue *v.* Harrison, 70 Cal. 380, 11 Pac. 636 (1886); Nelson *v.* First National Bank, 48 Ill. 36 (1868); Carnegie *v.* Morrison, 2 Met. (Mass.) 381 (1841); Bissell *v.* Lewis, 4 Mich. 450 (1857); Pollock *v.* Helm, 54 Miss. 1 (1876); Bank of Montreal *v.* Thomas, 16 Ont. 503. In the latter case the action seems to have been brought upon the bill rather than upon the contract to accept it, but questions of pleading were not raised.

[45] State National Bank *v.* Young, 14 Fed. 889 (1883); Atlanta National Bank *v.* Northwestern Fertilizing Company, 83 Ga. 356, 9 S. E. 671 (1889); Krakauer *v.* Chapman, 16 App. Div. 115 (dissenting opinion) 45 N. Y. Supp. 127 (1897).

[46] Jones *v.* Parker, 163 Mass. 564, 40 N. E. 1044 (1895); Equitable Gas Company *v.* The Baltimore Coal Tar and Manufacturing Company, 63 Md. 285 (1884); 3 POMEROY, EQUITY, §§ 1400 *et seq.*

[47] See Nelson *v.* First National Bank, 48 Ill. 36 (1868); Bissell *v.* Lewis, 4 Mich. 450 (1857).

[48] See the vigorous statement of Story, J., in Russell *v.* Wiggin, 2 Story (U. S.) 213, 231 (1842).

antee.[49] In other cases what seem on their face to be contracts of guarantee or offers to become guarantor have been treated on the offer theory of letters of credit.[50] But courts have not consistently treated such cases as cases of letters of credit.[51] The disadvantages of a guarantee theory are the doctrine as to notice to the guarantor when his offer is accepted by giving credit to the principal,[52] requirements of the statute of frauds as to the contents of the memorandum on which one secondarily liable may be charged,[53] and the danger of releasing parties secondarily liable in the course of dealings with the principal debtor.[54] Because of these, the value of letters of credit as instruments of credit would be seriously impaired if a guarantee theory were to be adhered to, and the courts

[49] Lafargue *v.* Harrison, *supra;* Walsh *v.* Bailie, 10 Johns. (N. Y.) 180 (1813); Taylor *v.* Wetmore, *supra; cf.* Birckhead *v.* Brown, *supra.* In Lafargue *v.* Harrison, the court's proposition that the letter of credit was "a guaranty by them of the credit to Mel and Sons during the time and for the amount specified" seems to be an awkward recognition of the instrument as a transaction of the law merchant. In effect, the court says to the issuer "you can't say the holder did not have funds with you because you guaranteed to the addressee that he had." A better way of putting it would be that the letter could reasonably be so interpreted, and after the addressee had acted on it, the issuer was estopped. But in this particular case, as the letter was drawn, there is no such representation, nor are there any words amounting to a guarantee of anything. If the court means that the legal effect of the letter was that of a guarantee, it is holding the letter of credit a self-sufficing instrument without seal or consideration.

[50] Boyd *v.* Snyder, 49 Md. 342 (1878) ("This contract of guaranty . . . analogous to a general letter of credit"); Lawrason *v.* Mason, 3 Cranch (U. S.) 492 (1806) ("We will become your security for 130 barrels of corn payable in 12 months"); McLaren *v.* Watson, 26 Wend. (N. Y.) 425 (1841), affirming 19 Wend. (N. Y.) 557 (1838) ("I hereby guarantee payment"); London Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164 (1899) ("and these presents shall be deemed to be, and shall constitute to you, a continuing guaranty by each of us"); Northumberland *v.* Eyer, 58 Pa. St. 97 (1868) (written guarantee indorsed on a note, which, said Sharswood, J., "is not distinguishable from a general letter of credit"); Cheever *v.* Schall, 87 Hun (N. Y.) 32 (1895) ("I will see you paid"). If Judge Sharswood's proposition is well taken, does the general letter of credit stand as a transaction of the law-merchant, requiring no common-law consideration?

[51] Adams *v.* Jones, 12 Pet. (U. S.) 207 ("I will be security for the payment"); Scribner *v.* Rutherford, 65 Iowa, 551, 22 N. W. 670 (1885) ("if you want anyone on the note I will fix it when I come in"). As to the effect of issuer's death where letter is treated as a guarantee, see Michigan State Bank *v.* Estate of Leavenworth, 28 Vt. 209 (1855).

[52] Adams *v.* Jones, *supra.* This led the court to hold the instrument a letter of credit in London Bank *v.* Parrott, *supra.*

[53] Cheever *v.* Schall, 87 Hun (N. Y.) 32 (1895).

[54] London Bank *v.* Parrott, *supra.*

therefore have tried not only to find better ways of treating genuine letters of credit, but have shown some tendency to turn guarantees into letters of credit in the supposed interest of security of mercantile transactions.

As a basis for discussing our third, or contract-for-benefit-of-third-party theory, we may take the case of *Carnegie* v. *Morrison*.[55] Here one Oliver, the Boston agent of the defendants, a firm of bankers in London, wrote as follows: —

"Messrs. MORRISON, CRYDEN & COMPANY,
London:

Mr. John Bradford, of this City, having requested that a credit may be opened with you for his account, in favor of Messrs. D. Carnegie and Company of Gottenburg, for three thousand pound sterling, I have assured him that the same will be accorded by you on the usual terms and conditions."

This letter was delivered to Bradford, but the bankers were notified that the letter was written and would be forwarded by Bradford to Carnegie and Company with a request for credit. This might have been treated as an offer by the defendant addressee to Carnegie and Company and accepted by them when they gave credit to Bradford. Counsel for defendants argued that it was only a contract between defendants and Bradford that the former would give the latter credit, so that the plaintiffs were not parties to it and could not sue on it. Answering this argument, Shaw, C. J., said:

"He (Bradford) had funds either in cash or credit with the defendants and entered into a contract with them to pay a sum of money for him to the plaintiffs. . . . He gave the plaintiffs notice of what he had done and sent them the instrument as authentic evidence of the fact. They assented to and affirmed it as an act done in their behalf and gave the defendants notice thereof and conformable to the terms of the letter of credit drew their bills on the letter of credit. The refusal to accept was a breach of the promise thus made. . . . It would be vain to say that this promise was not made for the benefit or (according to the terms of some of the cases) for the interest of the plaintiffs."

This looks very much like a theory of a contract between the issuer and holder for benefit of addressee. But such a theory would not

[55] 2 Met. (Mass.) 381 (1841). See also on "right of third party to sue," 25 L. R. A. 257, note; Franklin Bank of Baltimore *v.* Lynch, *supra.*

be tenable in jurisdictions which reject entirely the doctrine of allowing actions upon contracts by third party beneficiaries; and even where the doctrine is recognized, as it now generally is, still it involves so many difficulties and uncertainties that it would be a misfortune if it were resorted to and relied upon in connection with any instruments of general commercial importance.

A theory of estoppel was employed in *Johannessen* v. *Munroe*.[56] Here the holder obtained a letter of credit from the issuer upon false representations and turned it over to the addressee, together with $500 in cash, in payment of an outstanding indebtedness upon which the addressee was about to sue, whereupon he forebore suit. At the time this was done, the holder wrote (falsely) to the issuer that the letter had been delivered to the addressee in the regular course of business and that the addressee would avail himself of it accordingly. Before closing the transaction addressee inquired of the issuer as to the genuineness of the letter and was advised that it was genuine, that it would not be canceled, and that payment of drafts drawn pursuant thereto would not be stopped unless the holder gave notice that it had fallen into improper hands. Nevertheless on the day on which the addressee concluded his arrangement with the holder, the issuer canceled the letter, claiming it was being used improperly. The grounds of defense were, first, that the letter had been obtained by fraud and plaintiff was not a holder in due course for value; and, second, that the holder was not authorized to use the letter as he did. In the Appellate Division, the majority of the court, in sustaining a judgment for plaintiff, relied upon a passage in Daniel on "Negotiable Instruments,"[57] and held that delivery to the plaintiff and action thereon by plaintiff in good faith by forbearing to sue on his claim would cut off all defenses of the issuer. The Court of Appeals took the better ground of estoppel, saying:

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[56] 158 N. Y. 641, 53 N. E. 535, 9 App. Div. 409, 41 N. Y. Supp. 586, 84 Hun (N. Y.) 594 (1899).

[57] "While not possessing the characteristics of negotiability which pertain to bills and notes [they] partake of them to such an extent as to be necessarily classed as negotiable instruments." 2 DANIEL, NEGOTIABLE INSTRUMENTS, 3 ed., § 1790. All that this means is that if the letter is acted on according to its terms, the issuer cannot set up that he was defrauded into issuing it, nor go into the state of accounts between him and the holder. It is confusing to use the term "negotiable" in this connection. See 2 AMES, CASES ON BILLS AND NOTES, 783.

"We are of opinion that this entire transaction, beginning with the issuing of the letter of credit and closing with the settlement referred to, presents all the elements of an estoppel, and defendants are precluded from setting up a defense based upon the alleged invalidity of the letter of credit for any cause. . . . We have here the representation of certain facts by the defendants with knowledge that the plaintiff proposed to act thereon; the fact that he did so act and took the letter of credit and money in payment of his claim, releasing all parties from further liability. This constituted a taking of the letter of credit in good faith and for value. The plaintiff by the representations of defendants was induced to change his position, to give up his cause of action and proposed legal proceedings, acknowledge full settlement and payment of his claim, and to release all parties."

Gray, J., dissented on the ground that the letter of credit was a mere offer and that when it was discovered that the holder was about to use it for a different purpose than that which he had represented, it might be revoked. He was also of the opinion that taking on a precedent debt and giving a receipt for it did not constitute such a change of position as to raise an estoppel.

This decision obviously is quite out of line with the offer theory. In the first place if the letter was an offer it contemplated acceptance by addressee accepting bills drawn by the holder and in turn drawing on New York.[58] But, so far as appears, the letter had been revoked before any bills were drawn or accepted. If it be held that a promise not to revoke an offer makes it irrevocable, yet here there was no consideration for the issuer's promise, in

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[58] The letter read:

"No. 5687

Office of John Munroe & Co.
Bankers, 32 Nassau St., New York
Feb. 26, 1892.

Messrs. Munroe & Co.,
Paris:

Gentlemen:

We hereby open a credit with you in favor of Capt. J. A. Johannessen, S. S. *Rayton Dixon* for fifteen thousand francs (fcs 15,000) available in bills at ninety days date; on acceptance of any bill or bills drawn under this credit you are to draw on Carsten Boe, New York, at seventy-five days date; payable at the current rate of exchange for first-class bankers' bills on Paris on day of maturity. Commission is arranged.

Bills under this credit to be drawn at any time prior to May 1st, 1892.

Truly yours,
John Munroe & Co."

"The bill may be availed of in sterling, if desired, say six hundred pounds sterling (£600).

J. M. & Co."

answer to addressee's inquiry, that the letter would not be revoked. The majority of the court speak as if the letter were an evidence of indebtedness or even a negotiable instrument, so that the paper itself was taken by the addressee in payment of the precedent debt. But, if the offer theory is sound, the transaction between holder and addressee was really this: in consideration of the discharge of debt, the holder agreed to and did deliver the written offer to addressee so as to permit the latter to proceed to accept it. The discharge of the debt could not be an acceptance, for the terms of the offer exclude such a construction. Again, what did the issuer represent, which he is now estopped to deny, — addressee having changed his position on the faith of the representations? We may agree that after the letter was acted upon no claim of fraud in its inception might be urged. But in connection with the more difficult point as to revocation and the use made of the letter by the holder, what does the letter represent? It purports to be an authority to draw bills and a clearly implied promise to accept and pay them; and the answer to addressee's inquiry, beyond being a representation of the genuineness of the paper, is but promissory — promising in effect that the letter would not be revoked and that payment of drafts thereunder would not be stopped. And yet the court palpably feels that there is something else involved in the very issuance of a letter of this sort, — that inherently and by general commercial understanding it represents something else. What is this something else? What can it be but that the issuer had funds of the holder to the amount of the letter which he held by the direction of the holder to the use of the addressee subject to the terms of the letter? If the letter amounted to such a representation, then, the moment the addressee acted thereon and changed his position on the faith thereof, the issuer was estopped to deny that he held the money to addressee's use, and was liable, whether the change of position amounted to an acceptance of an offer or not. Other courts have taken a similar view of such letters.[59]

[59] "He had funds either in cash or credit with the defendants and entered into a contract with them to pay a sum for him to the plaintiffs." Shaw, C. J., in Carnegie *v.* Morrison, 2 Met. (Mass.) 381 (1841).

"Anyone to whom such letter might be shown in the course of business, as the predicate of a transaction, would infer and be justified in the belief, that the writer had agreed to be bound for the usee of it, either for his accommodation or because he was indemnified by effects in hand, or upon some good consideration, and would not

Summing up the Anglo-American cases, may we not say: *First:* The orthodox theory undoubtedly is one of an offer, becoming a contract when the addressee complies with its terms. This theory meets most of the cases of the past well enough, but fails in those cases in which the issuer has been held although he revoked before the terms had been complied with or although they had not been complied with. *Second:* The guarantee theory involves too many difficulties and is unsatisfactory, so that courts have inclined not to use it even when the instrument in form called for it. *Third:* The theory of a contract between issuer and holder for the benefit of addressee has only been suggested in the cases and involves so many difficulties and uncertainties as to be unsatisfactory. *Fourth:* The theory of estoppel may be made to meet all the cases if we treat the letter as a representation to the addressee that the issuer has money of the holder to his use, and say that he is estopped to deny this representation when the addressee has acted upon it. This is the only view advanced in the books that will meet the cases where recovery was allowed, although there was revocation before the doing of the act prescribed by the letter, or although the prescribed acts were not done at all. *Fifth:* Throughout the cases we may note the courts feeling, more or less subconsciously, that we

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entertain the thought that it was incumbent on him to inquire into the state of dealings between the writer and the usee of the letter, for the purpose of learning whether there was any contingency about it, or whether any change of circumstances between the date of the letter and the advances under it would affect the liability of the writer." Pollock *v.* Helm, 54 Miss. 6 (1876).

Is not this what is meant by the "guaranty of the credit" of the holder in Lafargue *v.* Harrison, *supra?*

"The doctrine of the liability of a party, giving authority to draw, to any *bonâ fide* holder of the bill drawn pursuant to such authority, lies at the foundation of the law governing "letters of credit" in the commercial world. . . . In this case the plaintiff was a holder . . . for *value*, and is not affected by the state of accounts between (holder) and (issuer)." Franklin Bank of Baltimore *v.* Lynch, 52 Md. 270, 282 (1879).

The analogy of money had and received to use of a third person is employed by Marshall, C. J., in Lawrason *v.* Mason, 3 Cranch (U. S.) 494 (1806). See also Krakauer *v.* Chapman, 16 App. Div. 115, 45 N. Y. Supp. 127 (1897). There the letter provided for bills at thirty days. One was drawn and paid. Before a bill could be drawn for the remainder of the indebtedness incurred on the faith of the letter, the holder absconded so that the drawing of a further draft became nugatory. The addressee was allowed to recover directly from issuer the amount of the unpaid indebtedness. Here the offer had not been accepted according to its terms; but the issuer had represented that he held funds of the holder to the use of the addressee and the latter was allowed to recover those funds to the extent of his interest.

have here a substantive institution of the law merchant, which ought to be sustained on its own basis; and that whatever common-law theories may be convenient for the purpose are to be resorted to in order to fortify it. It is significant that no deliberate written promise of a business man or commercial entity made as a business transaction to answer for credit extended on the basis of the writing has failed of enforcement in our courts.[60]

Let us now apply these several theories to the actual form of letters in general use to-day in our export trade and test them by the problems to which those forms and the requirements of modern business give rise.

III

Although letters of credit in our foreign trade vary greatly in form, it is possible to group them into four well-marked types, with many variations of form in each type. The words "confirmed letter of credit," or "irrevocable letter of credit," or both, appear or seem to be implied in each type; and it is on these words that the business world seems to put its main, if not its whole reliance. Leaving these words out of account for the moment and looking at the purport of the letter apart therefrom, we may take as our first type those whose words suggest immediately a notification or acknowledgment by the issuer of the receipt of money to the use of the addressee, to be paid him upon compliance with the terms of its receipt, which are stated as conditions in the letter.[61] Refer-

[60] The cases in note 45, *supra*, are an apparent exception. But the case in the federal court was one at *nisi prius* and the instrument was vague in its terms and by no means an ordinary letter of credit. In the Georgia case the language used, "we will carry you," was addressed to the holder, and evidently contemplated an extension of existing indebtedness only. What is said as to agreements for acceptance is but *dictum*. In the New York case a majority of the court upheld the letter.

[61] The following is an example of this type:

[Amount] [No.] [Date]

[Addressee]:

At the request and for the account of [holder] we have opened a confirmed credit in your favor, bearing the above number, available by drafts at sight to an aggregate amount of [amount of credit] for [purposes of credit].

Payments to be made against delivery to us of properly endorsed negotiable railroad bills of lading together with receipted invoices in triplicate at the above stated prices.

This credit to remain in force until .....

Any draft drawn under this credit must state that it is drawn under [description,

ence to the forms as set forth in the note will show that they contain (*a*) a statement that a "confirmed" credit has been opened in favor of the addressee for the account of the holder, which as we have seen courts have construed as a representation to the addressee that funds of the holder of the letter had been received and were held to the use of the addressee; (*b*) a statement of the conditions of the credit, or in other words, of the terms on which the funds were received and are held to the use of the addressee; (*c*) an authority to draw drafts on the issuer to the amount and under the conditions set forth; and (*d*) often an express promise to honor such drafts. This type of letter might be treated on the offer theory and could be upheld in that way. But it is perfectly obvious that those who draw and act on letters framed in such terms have in view something much more assured, permanent, conclusive and irrevocable than an offer.

Letters of the second type are evidently drawn under the advice of counsel impressed with the offer theory of the cases we have discussed. Such letters are drawn in the form of offers, which are to become contracts upon acceptance by performing the terms set forth in the letter.[62] Here there is no direct suggestion that funds

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date and number of letter] and must be addressed to [issuer] and the amount of the draft must be noted on the back hereof by the negotiating bank or bankers.

We hereby agree with the *bonâ fide* holders that all drafts issued by virtue of this credit and in accordance with the above stipulated terms, shall meet with due honor upon presentation at the office of the [issuer] if drawn and negotiated by [expiration date].

[Signature of issuer]

The following form, falling within the same type, suggests both money received and held to the use of the addressee and also notification of a contract between holder and issuer for the benefit of addressee:

[Addressee] [Date]

We received today from [foreign correspondent bank] a message as follows:

"Account [name of holder] open following confirmed credit [amount of credit] favor [name of addressee] against [terms and purposes of credit]."

Of which kindly take notice.

The credit will remain in force for [period of credit] and the same is hereby confirmed for the account of [foreign correspondent Bank]. [No. of Letter]

[Signature of Issuer]

[62] An example of this type is:

Irrevocable Export Credit No. [Expiration date]

[Addressee]:

You are hereby authorized to draw upon us for account of [holder] at sight to the extent of [amount of credit] covering [purposes and terms of the credit]. Payment to

are held; at most this could only be inferred from the authority to draw on the issuer for the account of the holder. What is most notable in this type is the care with which the authority to draw upon the issuer is brought within the terms of *Coolidge* v. *Payson* as interpreted in later cases in the Federal Supreme Court. Summarily stated letters of this type contain (*a*) a statement by way of caption, but not in their body or text, that they are "confirmed" or "irrevocable;" (*b*) an authority to the addressee to draw on the issuer for the account of the holder with a precise description of the drafts to be drawn. Looking only at this second element, these letters are clear enough; but they raise at once the question why if this is all there is to them, should the issuer say at the top of the instrument that it is "confirmed" or "irrevocable?" Does he mean to add something to the second element, and if so, what? In business understanding the answer is obvious, but in law we must inquire.

In a third type the form of letter suggests a contract between the holder and the issuer for the benefit of the addressee whereby the addressee is to be paid by the issuer on condition of his performing the terms of a contract which he has made with the holder. The letter takes the immediate form of a notification to addressee of the former contract.[63] Unless, because of the obvious disadvantages involved the courts were to twist such letters into offers, as we have seen them do where the instrument in form used language importing guarantee or suretyship, there is little in the text of this type of letter to lay hold of for any other common-law theory than one of notification of a contract between holder and issuer for the benefit of addressee. But such letters are also usually captioned, or in collateral correspondence are stated to be "con-

be made against [statement of documents required]. Drawing must clearly specify the number of this credit.

[Signature of Issuer]

[63] Following is an example:

[Addressee]: [No.] [Date]

We have received instructions from [holder] to pay you against your receipt in triplicate any sum or sums up to [amount of credit] against shipment of [terms and purposes of the credit]. This letter to be presented with your receipts and documents.

[Signature of Issuer]

Sometimes a contract between holder and issuer is expressly stated, *e. g.*, "we have received instructions from [holder] with whom all necessary arrangements have been made"; also such forms may include an authority to draw.

firmed," or "irrevocable," or sometimes "confirmed and irrevocable letters of credit." This raises at once the question whether the text of the instrument is not an informal attempt to express a transaction of another sort rather than that indicated by the text taken alone — a transaction well known to the commercial world by the name given it.

Lastly there is a fourth type drawn apparently with no theory in mind other than the business understanding of a "confirmed and irrevocable letter of credit," and on the assumption that the written promise of a business man in the course of business is self sufficient.[64] Here it will be observed there are no words suggesting the holding of money to the use of the addressee, and unless some meaning is attributed to the very words "confirmed letter of credit" which will bring it within the theory of a representation of money held to the use of addressee or the theory of an offer, the addressee must bestir himself to show a consideration by proof that the letter was issued in exchange for his then and there entering into a contract with the holder, or something of the sort. Either that or we must go outside common-law theory and look to the law merchant to uphold such letters.

As the matter stands in the decisions, the first type, from the standpoint of the exporter, is clearly the most satisfactory. In view of commercial usage, the understanding of the business world, and the decisions of the New York courts in *Johannessen* v. *Munroe* [65] and *Krakauer* v. *Chapman* [66] it may well be contended, and it is submitted, that courts which are reluctant to go further should hold, as the minimum of progress demanded, that use of the words

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[64] For example this form:

Irrevocable Letter of Credit

[No.] [Date]

[Addressee]:

At the request of [holder] we hereby open an irrevocable letter of credit, [No.] in your favor to the extent of [amount of credit] against [terms and purposes of credit] available until [expiration date] under the contract between yourselves and [holder].

We hereby agree and promise to pay you the amount above mentioned upon presentation of the documents in compliance with the terms of this credit.

[Signature of Issuer]

Other variations of these forms may be found in HOUGH, PRACTICAL EXPORTING, 544 *ff.*

[65] 158 N. Y. 641, 53 N. E. 535, 9 App. Div. 409, 41 N. Y. Supp. 586 (1899).

[66] 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

"confirmed letter of credit" or their equivalent should be construed to mean an acknowledgment of money received and held to addressee's use. What does the letter "confirm," if not this? But the more direct statement of the first type obviously gives a better assurance.

So, from the exporter's standpoint, the second type is more satisfactory than the third or fourth. Forms of this type clearly owe their origin to an effort to adapt what I have called the tourist type of letter, and the common-law theory of an offer, to the circumstances of trade to-day, rather than to the French theory of the modern letter as testifying to an *ouverture de crédit.* One conspicuous difference between the first and the second type, if the second is to be handled legally on the offer theory solely, will suffice to show why the first type is better suited to protect the exporter. In a letter contemplating successive instalments of delivery or performance, and authorizing the vendor-addressee to draw for each instalment as delivered, there would be, if the instrument is but an offer, a complete acceptance of the offer *pro tanto* with each delivery, but the offer could be revoked as to future instalments. Yet it may well be that the addressee has changed his position in arranging to take care of the whole series of instalments. In that event if the instrument amounts to an acknowledgment of money held to the use of the addressee, action thereon by the addressee would work an estoppel upon the issuer to deny that it was so held. Hence, as in *Krakauer* v. *Chapman*,[67] addressee might recover, without exactly doing the things prescribed, if he performed the substance of the conditions on which the money was held to his use. If to avoid an unfortunate result the estoppel theory is applied to a letter of the second type, the effect is to put the letter in our first type by construction.

The third type must be pronounced much less satisfactory. It is true, according to the great weight of American authority, the addressee-beneficiary may sue the issuer-promisor upon such a contract. Also by good authority, after notification of the contract to the addressee-beneficiary, the holder-promisee and issuer-promisor could not rescind so as to cut off the action of the addressee-beneficiary. But these doctrines of suit by third persons

[67] 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

upon contracts between others for their benefit and of the effect of notification upon the power to rescind such contracts, are so unsettled in their details, raise so many nice questions and are dealt with so differently in different jurisdictions,[68] that no lawyer would feel justified in advising an exporter to rely upon an instrument where it could only be construed as notification of a contract between issuer and holder for his benefit.

On any purely common-law theory, the fourth type seems thoroughly unsatisfactory. Without some *tour de force* of judicial construction, not without precedent as we have shown, the addressee in this type must establish a consideration, and it may not always be easy or even possible to do so. And yet some brief and simple form on the lines of this fourth type ought to be sufficient. It is late in the day for the law to be insisting that business instruments shall set forth the obvious with elaboration and detail. The days when nothing could be left to inference are past everywhere except in criminal pleading. A deed no longer is required to describe all the appurtenances in detail or even to speak of appurtenances in detail at all. Statutory forms are allowing the one word "warrant" to do the work of four elaborate covenants in a common-law conveyance. Express warranties have more and more been replaced by warranties implied in the transaction, and the whole subject has been settling down to the rational basis of exacting what good faith would require in view of expectations reasonably arising from what was said or done; so that we are beginning to be able to give legal effect to instruments even though they do not "exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert." [69] Is there not too much of this sort of archaic legal formalism still involved in instruments having to do with important business transactions? The mere promise to accept drafts, the mere promise not to revoke, the mere deliberate word and deliberate intention of a business man or a commercial entity, committed to writing as a business transaction, avail nothing. Hence, either the courts must recognize the confirmed letter of credit as a legal transaction of the law merchant, standing on its own bottom, or they must treat the words "confirmed letter of

[68] Williston, "Contracts for the Benefit of a Third Person," 16 HARV. L. REV. 43.

[69] Holmes, J., in Paraiso *v.* United States, 207 U. S. 368, 372 (1907).

credit" as importing something unexpressed which will accomplish the clear intent of those who issue and those who receive these instruments, or else important business interests must go unsecured and unprotected by law and business men must be driven to find ways of protecting themselves outside of the law.[70]

If we are not yet prepared to treat letters of the fourth type squarely on business usage as part of the law merchant, the burden of sustaining them must fall on that "much enduring word," estoppel. The New York cases show us a way out which has a real basis in the actual course of business. Normally in domestic commerce the purchaser, having contracted with the seller, goes to a bank, deposits money with it or makes arrangements for a loan whereby there is in effect a deposit of the money borrowed, and the bank issues the letter. Here, these facts being proved, the letter evidences that the bank has received and holds money to the use of the seller, upon the conditions named in the letter. In foreign commerce, the buyer contracts usually with the seller's agent abroad. He then goes to a foreign bank, deposits money or opens a credit — which by the continental law is the same thing — and the latter forwards the money to or sets up a credit with a New York bank, or forwards the money to or sets up a credit with such correspondent of the New York bank as the latter may designate. In either event, the New York bank, holding money or what it considers in substance the equivalent, issues the letter of credit, which the buyer-holder then turns over to the seller-addressee, or more commonly sends direct to such addressee at buyer-holder's request. From the nature of the case, it would be an intolerable hardship upon the addressee to compel him to prove that these several steps actually took place in any given case. Therefore, when the letter is issued, may not the addressee reasonably assume that these steps have taken place and understand the letter as so representing to him? If this is a reasonable interpretation and he acts on it, the issuer is estopped to deny the facts so represented. Hence, whenever the words "confirmed letter of credit" or their

[70] Is this not shown by the way in which business, disgusted with the backwardness of the law or more particularly of legal procedure, constantly resorts to extra-legal ways of adjusting controversies, as through Boards of Trade, Chambers of Commerce, Trade Associations, etc.?

equivalent are used, the letter should be taken as representing that money is held by the issuer to the use of the addressee, subject to the terms of the letter.

From the standpoint of the issuer, assuming that he or it intends to act in good faith, we should come to the same conclusions. If the issuer has funds of the holder or has taken pains to be secured before issuing the letter, he is in nowise prejudiced by a form of letter and a legal attitude towards such letter that will fully protect the addressee; and every issuer will be sure to require funds or proper security if he knows that the law will treat the letter as presupposing them. The point that seems most important to the issuer is to have the terms and conditions set forth so simply and clearly in the letter that he may pay with assurance upon inspection and receipt of documents and will not become involved in possible controversies between holder and addressee over the construction of an elaborate contract between them. In this respect, such express incorporations of the buyer-seller contract into the letter by reference as in the form in note 64 are of doubtful wisdom.

From the standpoint of the holder, again assuming that he intends to act in good faith, there can be no interest in any form or any state of the law which does not fully secure the addressee. The latter can only reach the credit by complying with its terms or, if some breach of contract by the holder makes that impracticable, by complying with his contract with holder so as to make the holder in justice and in law his debtor thereunder; so that for the most part the terms of the letter and the terms of the contract afford him all needed security. Nevertheless as the letter cannot well make all the terms of the contract express conditions without involving the issuer in risks he should not assume, it must be admitted that the buyer-holder, dealing with the seller-addressee at long range may be at a certain disadvantage on any theory of the letter which will be satisfactory to addressee and issuer. The obvious mode of protecting the buyer-holder, by provisions for inspection of goods bought under the contract and making, let us say, an inspector's certificate a condition precedent in the letter, would raise at once the difficulties with which lawyers have become familiar in cases of express conditions calling for architect's certificates, surveyor's certificates, opinions of lawyers as to title,

magistrate's certificates of loss, and the like.[71] Experience of these conditions and of the legal questions involved in them has not been such as to commend them for commercial purposes. It must be for the ingenuity of business to find some better mode of protecting the buyer-holder, if such protection is needed.

IV

The authorities say that a special letter of credit, *i. e.*, one addressed to a particular addressee, is not assignable.[72] On the other hand the understanding and custom of business men to a certain extent is different. Questions usually discussed under the head of assignability of letters of credit arise where the addressee seeks to pledge the letter or to assign it as security; in cases of business changes, as where an addressee partnership is changed or incorporated or a new corporation succeeds to the business and good will of an old one, or a merger or a consolidation occurs; in cases of a sub-contract or a number of sub-contracts with the seller-addressee; or further where a letter addressed to a particular addressee nevertheless expressly states that it is assignable, or contains an express power of designating those in whose favor it may be made available. How shall we treat these cases?

Where one attempts to assign such a letter, it is clear that under the offer theory no one may accept the offer, and thereby make a contract with the issuer, except the addressee to whom alone the offer is made. On the guarantee theory, the guarantee runs only to the creditor named, and no secondary liability can be incurred to anyone else except by means of a new contract. This rule has been applied very strictly to cases of business changes.[73] On the theory of contract for benefit of a third person, no one but the third person for whose benefit it is expressly made may avail himself thereof. On the estoppel theory, the representation is made only to the addressee; and it would seem that no one else may reasonably rely on or act upon a representation expressly addressed to a

[71] Tullis *v.* Jacson, [1892] 3 Ch. 441; Nolan *v.* Whitney, 88 N. Y. 648 (1882); Chicago R. Co. *v.* Price, 138 U. S. 185 (1891); Insurance Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804 (1888).

[72] Robbins *v.* Bingham, 4 Johns. (N. Y.) 476 (1809); Birckhead *v.* Brown, 5 Hill (N. Y.) 634; Walsh *v.* Bailee, 10 Johns. (N. Y.) 180 (1813).

[73] Sollee *v.* Mengy, 1 Bailey, Law (S. C.) 620 (1830); Smith *v.* Montgomery, 3 Texas, 199 (1848); Crane *v.* Specht, 39 Neb. 123, 57 N. W. 1015 (1894).

particular person, for his purposes only, and on its face not intended to be shown to or relied upon by anyone else. Consequently no one else may invoke an estoppel.[74] When, therefore, the addressee assigns or puts up the letter as security, the only legal right of the pledgee would seem to be a right to the possession of the paper. Without the paper, the addressee cannot enforce his rights against the issuer nor negotiate bills. Thus the right of possession of the paper is a valuable one and by its mere possession the pledgee is in a position to exert pressure upon the pledgor for his security. The case is legally like the deposit of title deeds in English law,[75] and suggests the question whether the pledgee of a letter of credit obtains any lien in equity. But what has the addressee-pledgor to give him? Certainly he has nothing *in praesenti* on any of the theories considered.

Turning to the theory of the letter as an acknowledgment of money received and held to the use of addressee, we get a like result. True, in an ordinary case of money had and received, there is a debt enforceable in a money count, which debt may be assigned. But here the money is held to the use of the addressee upon condition and there is no assignable debt until the condition is performed. Nor is the result different upon a theory of the letter as an instrument of the law merchant. For the letter by its very terms does not contain a power of negotiation as in the case of commercial paper payable to order or bearer. Consequently the position of the assignee for security seems to be simply that of one who for his security has possession and right of possession of a document without which the pledgor thereof cannot realize a valuable possibility. When the possibility has come to fruition in an actual claim *in praesenti*, equity might then consider the pledgee of the letter an equitable lien-holder.[76] But this could scarcely happen without the production of the instrument, so that possession of it and consequent control of the situation is the pledgee's real security. In a case like *Krakauer* v. *Chapman* [77] the theory of money held by the issuer to the use of the addressee would be advantageous to the pledgee. If the addressee may sometimes have a claim against the

[74] Fletcher Guano Co. *v.* Burnside, 142 Ga. 803, 83 S. E. 935 (1914); Robbins *v.* Bingham, *supra*.

[75] 3 POMEROY, EQUITY, 3 ed., § 1264.

[76] *Ibid.*, § 1237.

[77] 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

issuer *in praesenti* without complying with impracticable terms of the letter, yet obviously he could not sue and enforce that claim without the letter. In such a case, on established principles, the pledgee of the paper would have an equitable lien.[78]

Where business changes take place the case is more difficult. For reasons already set forth there is no help in such a case on theories of offer, or guarantee, or contract for the benefit of a third person. If we think of the letter as an acknowledgment of money held to the use of the addressee upon condition, we must ask whether the condition can be performed. And this resolves itself into a question whether the buyer-seller contract may be assigned. If that contract can be assigned to and enforced by the business successor, it is submitted that the latter may perform the conditions of the letter and enforce it. Ordinarily when such business changes take place the parties no doubt will take care to make an express agreement obviating such questions. But if the buyer-holder should seek to take advantage of the situation to escape from his contract and hence refuse to enter into or sanction a new agreement, the point might well be important.

In case of sub-contracts, what has been said as to pledge of the letter by the addressee becomes applicable. The addressee, where there is a sub-contract given by him, may deposit the letter with the sub-contractor which will raise the same questions as the deposit of the letter for security. Where there are a number of sub-contracts, so that this course is not possible, the addressee might deposit the letter with a trustee for the benefit of the sub-contractors according to their several interests. But the usual plan is to deposit the letter with a bank as security and ask the bank to issue new letters of credit addressed to each of the several sub-contractors.

A letter which is expressly made assignable raises questions like those which arise upon a general letter. Such an instrument amounts to a letter addressed to the addressee or to such person or persons as he may turn it over to. Or, if the letter is in the form of authority to draw, it amounts to a power conferred on the addressee to designate those who may avail themselves of the offer. Letters sometimes contain express powers of designation of this

[78] Harrison *v.* McConkey, 1 Md. Ch. 34 (1847); Ruckman *v.* Ruckman, 33 N. J. Eq. 354 (1880); Pringle *v.* Pringle, 59 Pa. St. 281 (1868); Pierce *v.* Bank, 129 Mass. 425 (1880); Hill *v.* Stevenson, 63 Me. 364 (1873).

sort. They raise no difficulties on the offer theory, as the terms of the offer provide how the offeree shall be ascertained. They raise no difficulties on the theory of the letter as an acknowledgment of money held to the use of the addressee, for the letter expressly empowers the person to whose use the money is held on condition, to designate the others to whose use it may be held on like conditions, and it is a representation that the money is held to such uses on which any one so designated may reasonably rely and may thus raise an estoppel in his favor.

So much for so-called questions of assignability. Suppose that the buyer-holder becomes insolvent and the security of the issuer fails after the seller-addressee has done a substantial part of the work of manufacture, but before he has made deliveries and drawn on the issuer, and the issuer in this interval seeks to cancel. On the offer theory this brings up the much mooted question of an offer requiring by its terms a series of acts to constitute acceptance, which offer is revoked after part of the series of acts has been performed, to the prejudice of the offeree, but before acceptance is complete.[79] Courts have usually been able to avoid this question by straining construction of the transaction so as to make it a bilateral contract, treating the partially completed acceptance as part performance of a bilateral contract. But if the offer theory of letters of credit is adhered to, this way of escape is not open in the present case since by our hypothesis the letter is but an offer and the action of the addressee admits of no other possible construction than that of acts falling short of acceptance. Moreover, they are acts in performance of the contract with the buyer-holder and not acts directly in acceptance of the issuer's offer. Protection of the seller-addressee in such a case clearly requires a theory of the letter as acknowledging that money has been received and is held to his use or else a theory of the letter as a substantive transaction of the law merchant. A situation similar on principle where the letter is conditioned on instalments of delivery has already been discussed.

Let us carry back the foregoing situation one step further. Suppose the buyer-holder, perhaps to make a more advantageous contract elsewhere, seeks to pull out from the sales contract before

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[79] McGovney, "Irrevocable Offers," 27 HARV. L. REV. 644.

the seller-addressee has done anything toward performance, and so procures the issuer to attempt cancellation of the letter. It would seem that the letter might be canceled on the offer theory, even though it is stated to be irrevocable, since if we concede that a collateral agreement not to revoke an offer will make it irrevocable, there is nevertheless no consideration here for such agreement. Also it would seem that the letter under the theory of its being an acknowledgment of money had to addressee's use, might be canceled, unless the addressee can meet the burden of showing that the issuer *actually* received the money to his use, for the letter would be an admission only and no estoppel would be available. A contrary result would be reached on the theory of the letter as a notification of a contract between holder and issuer for the benefit of addressee, in jurisdictions where it is held that there can be no rescission by the contracting parties after the third-party beneficiary has been notified. This sort of situation calls for a theory of the letter of credit as a self-sufficing instrument of the law merchant.

What is the position of the issuer in case of controversies between the buyer-holder and the seller-addressee as to performance of the sales contract and construction of its conditions? The issuer could hardly become involved in such controversies nor incur risk because thereof if the letter were drawn with judgment, and liability thereunder were expressly made to depend on a few plain simple conditions. But this question may easily become important under some of the forms in current use which seem to incorporate the contract by reference and so make its terms conditions of the letter. If the issuer is in the position of one who has received money from A to the use of B upon a condition, it is obvious that circumstances may arise in which B will claim the money on the ground that the condition has been fulfilled while A will claim it on the ground that the condition has failed. In that event there is a typical case for interpleader, which would afford the issuer full protection were both holder and addressee within the jurisdiction. As the holder is usually abroad, the case is not so simple. But could not the issuer bring his bill of interpleader against the addressee and holder in a court where he could reach addressee and by notifying holder obtain a decree which would at least settle the rights of the addressee and bind the holder so far as the domestic

forum is concerned? [80] Short of this, the issuer's protection must be the conditions of the letter of credit and his security contract with the holder whereby he is protected so long as he abides by and exacts its conditions. It should be observed that in this situation the interests of both issuer and addressee are best subserved by a theory of the letter as showing that issuer holds money to the use of addressee. On such a theory, interpleader may clearly be resorted to, while on other theories of the letter the technical requirements of interpleader would raise many difficulties.

A letter of credit may or may not fix an expiration date, though it may be assumed that the contract between buyer and seller will always contain a time provision. Three possibilities suggest themselves: The letter of credit may expressly fix a date when the credit shall expire, or it may fix no date of expiration, or it may fix no such date but may contain a statement that it is to "expire by limitation." Questions may arise where the buyer-holder and seller-addressee afterwards modify the provisions of the sale contract as to time of performance. If the letter of credit expressly fixes a time, the addressee, on any theory of the letter, may not avail himself of the credit unless he complies with its terms within the time fixed. In mercantile contracts time is an essential term,[81] and whether the expiration date named in a letter be regarded as a limitation of an offer, or a condition precedent in an acknowledgment of money held to addressee's use, the result would be the same.

If no time is fixed much would depend on which theory is adopted. On the offer theory, no time being fixed, the offer would remain open for a reasonable time, and it would seem that in the absence of any other indication the limits of what is reasonable would be determined by the time provisions of the buyer-seller contract. On the guarantee theory the sales contract would be the principal obligation and it would follow that any time modification thereof without the issuer's knowledge and consent would release his liability. On the theory that the letter of credit is a notification of a contract between holder and issuer for benefit of addressee, we should have to be governed by that contract, if we could ascertain

[80] Stevenson *v.* Anderson, 2 Ves. & B. 407 (1814).

[81] Norrington *v.* Wright, 115 U. S. 188 (1885).

its terms, in the absence of any representation of them in the notification; and as that contract would probably simply be one to pay what should accrue to the addressee under the terms of the then existing buyer-seller contract, in which, as a mercantile contract, time would be an essential element, any modification as to time would thus seem to be a new contract between buyer-holder and seller-addressee to which the contract between buyer-holder and issuer for the benefit of the addressee would not be applicable. On the theory of money received and held to the use of addressee on condition, the issuer would seem to be in the position of a stakeholder for buyer-holder and seller-addressee according to their respective interests, subject to such conditions as the letter may contain. If so, no conditions as to time being imposed, the parties should be able to fix those interests between themselves by further contract, if they choose. In Japanese forms, where no time is fixed, it is not uncommon to find a provision that "this letter expires by limitation." This presumably originates in a provision of the Japanese law,[82] taken from German law,[83] requiring express reservations of power of revocation and express provisions for lapse. It effects nothing that would not take place in our law without such clause, so that what has just been said would apply.

We should also consider the question of inability to perform the conditions, and the effect of supervening events (*e. g.*, government embargo, fire, strikes, etc.) upon the obligations incurred by the letter. It may well be that the buyer-seller contract will contain provisions as to these things and yet they will not be provided for in the letter of credit. No doubt in general, the parties being agreed in desiring the execution of their contract, extensions of credit would be arranged in such cases. But should the buyer-holder be desirous of withdrawing from his contract he might take advantage of the impossibility of performance of the conditions of the credit and, by trying to cancel, seek to embarrass the seller-addressee by compelling him to pursue his remedy for breach of the contract in a foreign land. In such a case, it would seem clear that on the offer theory of a letter, nothing short of the performance of the condi-

[82] JAPANESE CIVIL CODE (De Becker's translation), Arts. 521, 524.

[83] GERMAN CIVIL CODE (Wang's translation), §§ 145, 147.

tions set forth could be an acceptance, and so if such performance became impossible, we should simply have the case of an offer which could not be accepted. The acts of the seller-addressee in the course of manufacture or filling his order under the contract would not really be acts preliminary to acts of acceptance but would be no more than acts in performance of the sales contract. Hence addressee's recourse would be an action as seller against buyer on the buyer-seller contract. Would the case be different on a theory of money received and held to the use of the addressee, or on a theory of the letter of credit as a self-sufficing instrument of the law merchant? If money is received and held to the use of another on an express condition precedent, it is not easy to see how that condition may be dispensed with. If one of the parties made performance of a condition impossible, he might be said to have "waived" it. But such would not be likely to be the case. It would seem that the addressee should consider the risk before he acts on the letter, and if he has reason to fear difficulty, should insist on provisions in the letter for extension of the credit on given contingencies.

It is true there is authority in New York, where there has been a tendency to deal with express conditions as if they were conditions implied in law,[84] which seems to indicate that where there is a debt between holder and addressee, incurred by holder through use of the letter, the issuer may be liable although performance of the conditions is not possible. In *Krakauer* v. *Chapman*[85] the letter of credit read as follows:

"X will send you an order for goods he requires and is authorized to draw on me in your favor for the amount of your bill at thirty days' sight."

X ordered goods to the amount of $1000. Addressee did not have all the goods required to fill the order at the time, but delivered $900 worth of goods at once and the balance later. When the last delivery was made X drew upon the issuer for half the order and the bill was accepted and paid. Afterwards X absconded and after unsuccessful attempts to collect from him, the addressee after eight months drew on issuer for the balance. When the first

[84] Nolan *v.* Whitney, 88 N. Y. 648 (1882); COSTIGAN, PERFORMANCE OF CONTRACTS, 41–43.

[85] 16 App. Div. 115, 45 N. Y. Supp. 127 (1897).

draft was made, issuer had funds of X sufficient to meet the whole amount of the order, but at the time he was notified that there was an unpaid balance, he no longer had funds of X. A judgment for the addressee was affirmed on the ground that as the drawing of a further draft by X became impracticable because he had absconded, the issuer was obligated to pay for the goods in another way. Two of the five judges dissented. As the letter appears to contemplate one draft for the amount of one order, and one draft had been drawn and honored and the issuer, after eight months, had ceased to hold funds for X, one may well ask whether the circumstances did not amount to a representation to the issuer that the credit had been fully used and so raise an estoppel in favor of the issuer who had adjusted his accounts with the holder on the faith of this apparent state of things. Perhaps this was what one of the dissenting judges had in mind in saying that the second draft was not drawn in a reasonable time. At any rate the soundness of this decision of an intermediate appellate court is too questionable to justify reliance upon it for so doubtful a doctrine as one that courts may make parties' transactions over for them by dispensing with express conditions precedent.

In *Krakauer* v. *Chapman* performance of the conditions of the letter was impracticable because the condition called for the drawing of a draft by a party who had absconded. Another case more likely to arise may occur where the letter is conditioned in substance upon performance of a contract between buyer-holder and seller-addressee and the holder for any reason countermands his order or refuses to go on with the contract. Here after such a breach the law would not permit the seller-addressee to proceed with further performance of the contract, and thus performance of the conditions of the letter would become impracticable. In such cases, if the letter is treated as acknowledging that money of the holder has been received and is held to the use of the addressee upon condition, and a breach of contract by the holder renders it impracticable for the seller-addressee to go on and hence impracticable to perform further the conditions of the letter, how far is the estoppel to deny that money of the holder is in the issuer's hands, raised by the addressee's acting on the faith of the letter, available to the addressee for the purpose of reaching such fund by attachment or garnishment in an action on the contract by ad-

dressee against holder? It will be observed that the forms of contract sometimes used to secure the issuer, prior to his issuance of the letter, cover all loss or damage to him arising from his issuance of the letter and so fully protect him.[86] No inequitable result would follow from the application in this way of estoppel; for the estoppel is raised by the circumstance that the addressee has relied and acted upon a reasonable understanding of the letter as acknowledging that the issuer holds moneys or funds of the holder. Why is this estoppel not as available to enable an addressee who acts promptly to protect himself in case a holder breaks his contract, as it is to enable him to draw drafts where the contract has not been broken but the issuer seeks to cancel his letter? Perhaps some such conception was in the mind of the Court in *Krakauer* v. *Chapman.*

V

Of the several common-law theories developed in the cases growing out of the old time letter of credit, we have already seen that the offer theory was on the whole the orthodox theory in the sense that it has the support of the larger number of judicial opinions, but that it failed to explain all the cases; whereas the theory of the letter as an acknowledgment of money held to the use of the addressee on condition will explain all the cases and has the support of some of the strongest decisions. Applied to the forms of export letters of credit now in use and to the problems arising thereunder, the guarantee theory and the theory of notification of a contract between holder and issuer for the benefit of addressee are both as unsatisfactory as they proved to be when applied to the cases of the past, and they may be dismissed without further comment. Of the two more satisfactory theories, that of money held to the use of addressee best meets the test of the present day forms of such letters and the needs of business under the problems they raise. The offer theory is impotent to give effect to the words "confirmed" or "irrevocable" on which the business man sets such store; is inadequate where the issuer in an instalment contract seeks to cancel as to subsequent instalments after the delivery of one or more instalments; is inadequate where the holder seeks to

[86] See form in HOUGH, PRACTICAL EXPORTING, 548; also Vaughan *v.* Mass. Hide Corporation, 209 Fed. 667 (1913), where issuer's indemnity contract also provides for lien on goods and special trust receipts.

withdraw and induces the issuer to try to cancel after the seller-addressee has begun to perform his contract; is inadequate where the buyer-holder seeks to pull out or break the contract by anticipation, before the seller-addressee has done anything thereunder; is unsatisfactory in case of business changes and gives rise to doubtful questions in situations where the issuer may need the protection of a bill of interpleader. In all these cases the theory of money held to the use of the addressee proves much more satisfactory, and if we must have a strictly common-law theory, it is much to be preferred.

But all the requirements of the situation are met and on the whole are better met by treating the letter of credit as a self-sufficing instrument of the law merchant. In the end nothing will do so well as a frank and full recognition by law of the universal understanding of the commercial world. To bring this about, bankers should agree on a simple, uniform letter, and the courts should give effect to it for what it is intended to be. Perhaps the timid, not to say false, conservatism of the courts may compel business men to turn to the Commissioners on Uniform State Laws and invoke the aid of the legislator. But legislation cannot come in time to take care of the litigation that is almost certain to flow presently from the enormous volume of business done under these letters in the last four years. The courts may, if they will, do all that is needed; for, I repeat, it is a false conservatism that stands in their way. Courts are properly cautious in abandoning rules or doctrines, since to do so may endanger the stability of our economic order by disturbing the transactions of the past and unsettling acquisitions; but there is nothing truly conservative in adhering to conditions of uncertainty in the laws governing commerce, or in defeating or unsettling business transactions, carried on in large volume, by insisting on applying to them doctrines or theories developed for earlier and different conditions of trade, or in disturbing credit by making it uncertain whether the deliberate promises of business men made in the course of business as business transactions, and in practice relied upon with confidence in the every day course of our commerce, are to be legally enforceable. In the words of Cockburn, C. J.,[87]

[87] Goodwin *v.* Robarts, L. R. 10 Ex. 337 (1875). *Cf.* 2 MACHEN, CORPORATIONS, §§ 1734 *ff.*; Mercer County *v.* Hacket, 1 Wall. (U. S.) 83 (1863); White *v.* Vermont, 21 How. (U. S.) 575 (1858). In Mercer County *v.* Hacket, Grier, J., says (page 95):

"Why is the door to be now shut to the admission and adoption of [commercial] usage, as though the law had been formally stereotyped and settled by some positive and peremptory enactment? . . . Why is it to be said that a new usage which had sprung up under altered circumstances, is to be less admissible than the usages of past time?"

Let us hope that New York, where most of these questions are likely to arise, will prove capable of finding another Kent upon her bench in this twentieth century — when her commercial interests and the commercial development of the country at large call for him no less than did the opening years of the nineteenth century. Lord Mansfield sought to establish a doctrine that no promise in writing made by a business man in the course of business could be held *nudum pactum.*[88] Is it not time that business transactions in our law should stand as such and be entitled to legal protection because they are such, without the necessity of continually giving them artificial forms in order to comply with historical requirements of consideration, and without the risk that they will fail because business has chosen to grow along its own lines instead of hewing eternally to some fixed line of common-law doctrine or tradition. Commerce is able to function safely on the theory that "a business man's word is as good as his bond." Our courts can afford to make this plain theory of business an effective theory of law.

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"Usage of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law."

[88] Pillans *v.* Van Mierop, 3 Burr. 1663 (1765).